(55) (53)

Supreme Court, U.S.
FILED
DEC 10 1996
CLERK

Nos. 95-1858 and 96-110

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

DENNIS C. VACCO, Attorney General of the State of New York; GEORGE E. PATAKI, Governor of the State of New York; and ROBERT M. MORGENTHAU, District Attorney of New York County,

Petitioners,

v.

TIMOTHY E. QUILL, M.D.; SAMUEL C. KLAGSBRUN, M.D.; and HOWARD A. GROSSMAN, M.D.,

Respondents.

STATE OF WASHINGTON, CHRISTINE O. GREGOIRE, Attorney General of Washington,

Petitioners,

v.

HAROLD GLUCKSBERG, M.D., ABIGAIL HALPERIN, M.D.; THOMAS A. PRESTON, M.D., and PETER SHALIT, M.D., Ph.D.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND CIRCUIT AND FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL WOMEN'S HEALTH NETWORK AND NORTHWEST WOMEN'S LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

CHRISTOPHER J. STESKAL
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Of Counsel

SYLVIA A. LAW*
40 Washington Square South
New York, NY 10012
(212) 998-6265

Counsel for Amici Curiae

* Counsel of Record

December 10, 1996

34 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSENT OF THE PARTIES

All Petitioners and Respondents in both *State of Washington, et al. v. Glucksberg, et. al.*, No. 96-110, and *Vacco, et al. v. Quill, et. al.*, No. 95-1858, have consented to the filing of this brief. Their letters of consent are being filed herewith.

INTEREST OF *AMICI CURIAE*

Amicus National Women's Health Network (the "Network") is the only national public-interest membership organization devoted solely to women and health. Founded in 1974, the Network has influenced national policy as a women's voice dedicated to humane, responsive health care. *Amicus* Northwest Women's Law Center ("NWLC") is a non-profit public interest organization dedicated to advancing the legal rights of women through litigation, legislative advocacy, education and an information and referral telephone service. Since its founding in 1978, the NWLC has been dedicated to protecting the fundamental rights to liberty, privacy, autonomy and bodily integrity. The NWLC has participated in litigation opposing a variety of state restrictions on individual liberty in the context of abortion and reproductive freedom.

Amici, women's rights organizations and advocates, explain why these cases raise constitutional issues of special importance to women. Although the criminal statutes challenged here do not use gender-based classifications, and the fundamental liberty interest at stake here is of vital concern to all people, women's perspectives on this Court's fundamental liberty jurisprudence are distinctive because the law and the Constitution have treated men and women as different. Much of that jurisprudence has been developed in the context of state legislative restrictions on contraception and abortion, matters of special interest to women. This brief discusses how the treatment of women under our Constitution and laws supports the claims advanced by the Respondents in these cases.

SUMMARY OF ARGUMENT

These cases require the Court to resolve whether terminally ill people have a constitutionally protected interest in controlling the circumstances of their death and whether that interest is violated by an absolute and uncompromising ban on physician assistance. *Amici* urge the Court to affirm the decisions of the Ninth Circuit, *en banc*, and the Second Circuit holding that terminally ill individuals have a constitutionally protected liberty interest in controlling the circumstances of their deaths. That liberty interest precludes states from enacting blanket criminal prohibitions on doctors who facilitate the choices of competent, terminally ill patients who seek to hasten death. The experience of women under the Constitution and laws supports this Court's protection of such fundamental and basic personal rights of liberty and choice.

This Court's precedents recognize a principled and cohesive concept of liberty that guards against unwarranted state interference with highly intimate, personal choices—those that are central to dignity and autonomy—including choices relating to marriage, childbirth, family relations and death. Although the constitutional protection of fundamental liberty is vital to all people, many of the situations in which this Court has protected fundamental liberty against state inference are of particular importance to women. Under this Court's ordered and principled conception of fundamental liberty, the choice of a terminally ill person about the circumstances of his or her death must be protected against blanket state prohibition on physician assistance.

In order to reverse the decisions below, Petitioners the State of Washington and the State of New York (the "States") and many of the *amici* who support their position suggest that the Constitution protects only those rights specifically recognized when the Constitution or the Fourteenth Amendment was adopted. This wooden, historically frozen

concept of constitutionally protected liberty poses a particular threat to women (among other historically oppressed populations) because, both in 1789 and in 1868, our Constitution and laws pervasively and explicitly denied women personal, civil and political rights. Although history and tradition can serve as useful guides in the interpretative process, the Constitution's guarantee of liberty ultimately must be interpreted in a principled manner that acknowledges a cohesive and evolutionary concept of liberty and that is sensitive to the social inequalities imbedded in our history and traditions.

The States contend that even if the laws at issue here implicate a fundamental liberty interest, they nonetheless pass constitutional muster. This Court has long held that a state law that burdens the exercise of fundamental liberties must be carefully tailored to serve important state interests. The States offer two core justifications for their absolute criminal ban on physician assisted suicide: first, the desire to protect vulnerable people from coercion by banning even the authentic and informed choices of terminally ill people; and second, the desire to promote respect for life, regardless of the circumstances or conscientious choices of the person who is living it. Both of these purposes asserted by the States (or closely analogous purposes) have historically been utilized in ways that have been particularly damaging to women.

The States' blanket ban on physician assisted suicide does not protect individual choice from coercion, but instead prohibits Respondents from freely choosing to exercise a fundamental liberty. A state may act to prevent coercion, to assure authentic choice, to encourage the medical profession to do a better job of treating pain and depression, and to address a wide range of legitimate state concerns about the welfare of its people. But it must do so by enacting properly tailored laws that safeguard the rights of all individuals to exercise their fundamental liberties, which include the right

of a terminally ill person to choose freely (with the advice of a doctor and in accordance with his or her conscience) whether to hasten death. Women's experience under the laws and Constitution—and particularly the experience of women prior to this Court's recognition that the Constitution protects individual choice over procreation—illustrates that people are injured, the quality of their lives diminished and their humanity denied when the law prohibits free and authentic choice about important life decisions.

The States' assertion of an absolute and overriding interest in protecting life, irrespective of the circumstances, has been squarely rejected by this Court. That interest has been most often asserted to defend laws that deny women their fundamental liberty to choose abortion. Women's experience in seeking legal and constitutional protection for reproductive choice counsels an imperative need for careful scrutiny of state efforts to use the criminal law to mandate the perpetuation of life over all competing interests, including such valid and compelling interests as the desires, needs and indeed fundamental rights of the person who must live that life.

Finally, in the courts below, the States urged a rule of constitutional interpretation that would dictate that a law that is challenged as violating a fundamental constitutional right may not be held unconstitutional unless it is invalid in every conceivable situation to which it might apply. This rule has no application to these cases, because Respondents challenge the laws at issue here as applied only to them and similarly situated people. Indeed, the States do not argue that this is an appropriate case for this Court to apply the rule they urged below. Moreover, even if applicable to these cases, the rule is inconsistent with the principles and practices of the last two centuries and would threaten all constitutionally protected liberties, including those that are particularly important to women.

ARGUMENT

I. TRADITIONAL CONCEPTS OF CONSTITUTIONAL LIBERTY PROTECT THE CHOICES OF COMPETENT, TERMINALLY ILL PEOPLE.

The liberty interest asserted by the Respondents in these cases encompasses several elements. Competent people who are confronted with imminent death because of terminal illness no longer enjoy many of the most significant aspects of life and choice. For Respondents then, the most meaningful liberty left available to them is the ability to control the circumstances of death. Justice Stevens eloquently described this interest in *Cruzan v. Missouri Dep't of Health*:

> "Choices about death touch the core of liberty. Our duty, and the concomitant freedom, to come to terms with the conditions of our own mortality are undoubtedly 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' . . . .
>
> The more precise constitutional significance of death is difficult to describe; not much may be said with confidence about death unless it is said from faith, and that alone is reason enough to protect the freedom to conform choices about death to individual conscience. We may also, however, justly assume that death is not life's simple opposite, or its necessary terminus, but rather its completion. Our ethical tradition has long regarded an appreciation of mortality as essential to understanding life's significance. It may, in fact, be impossible to live for anything without being prepared to die for something."

497 U.S. 261, 343 (1990) (Stevens, J., dissenting) (citations omitted).[1] As Justice Stevens recognized, the power of the terminally-ill to choose the circumstances and timing of death is fundamental, however that choice is exercised.

Decisions regarding the circumstances and timing of one's death also implicate rights of intimate association. No state currently prohibits suicide, but many terminally ill patients who would choose to die in a private, dignified, non-violent and effective manner that requires physician assistance are prohibited from doing so by the statutes at issue here. A criminal ban on physician assistance to the terminally-ill forces those individuals to act alone and prevents them from seeking the support and comfort of their physicians and their loved ones. When suicide is allowed, but help in dying is prohibited, the terminally-ill person is left to die alone and often with prolonged pain.[2] Thus, the state denies the

---

[1] Although Justice Stevens articulated this principle in a dissent, the Court did not disagree with his formulation of the liberty interest at state. Rather, the Court split over whether a state could impose a heightened evidentiary standard before a terminally ill patient could exercise that liberty interest by terminating a life support system. *See infra* note 24.

[2] Respondent Dr. Timothy Quill offers this reflection on the death of Diane, the long-term patient to whom he had provided barbiturates:

> "I did not want her to have to face this final moment alone. Had she asked me to be with her, and had I complied, the legal risk of my participation would have increased substantially. She died alone as a final altruistic act to protect both her family and me from potential prosecution. She researched the law in the state of New York and rightly discovered that the legal risk of the assisters increases dramatically if they are present at the time of death."

Timothy E. Quill, *The Ambiguity of Clinical Intentions*, 329 New Eng. J. Med. 1039, 1040 (1993).

Different terminally ill people make different choices. Andrew Solomon describes his mother, who went through months of aggressive treatment for cancer. She said:

> "As long as there is even a remote chance of my getting well, I'll go on with treatments. When they say that they are keeping me alive but without any chance of recovery, then I'll stop."

Andrew Solomon, *A Death of One's Own*, The New Yorker, May 22, 1995, at 58. At the end,

> "[she] considered doing the whole thing on her own but had thought that the shock would be worse than the memories of having been with her for the experience. As for us, we wanted to be there. My mother's life was in other people, and we all hated the idea of her dying alone."

Id. at 64.

terminally-ill profoundly important rights of intimate association.

The interest that Respondents assert is well rooted in this Court's precedents. Throughout our history, this Court has interpreted the Constitution to protect basic individual rights of personal liberty, choice and intimate association.[3] In *Griswold v. Connecticut*, the Court held that the liberty protected by the Constitution encompasses married people's right to use contraceptives and look to their physicians to help obtain them. 381 U.S. 479 (1965). This Court has recognized that "[t]he full scope of the liberty guaranteed by the Due Process Clause . . . is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints".[4] *Griswold* offers a principled and reasoned approach to defining liberty, an approach which is in the mainstream of this Court's precedents.[5] A dying person's interest in controlling the

---

[3] *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking a law that prohibited parents from teaching their children in a language other than English); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (striking a law that required parents to send their children to public school).

[4] *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds of an earlier challenge to the Connecticut ban on birth control).

[5] *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973); *Cruzan v. Missouri Dep't. of Health*, 497 U.S. 261 (1990); *Planned Parenthood of*

circumstances and timing of his or her own death falls squarely within the "rational continuum" of liberty recognized in *Griswold*.[6]

Women have a special interest in preserving and developing the protection of liberty recognized in *Griswold*. Despite the fact that a law denying married people access to contraception impacts married men as well as married women, as a practical matter, married peoples' inability to control fertility hurts women more than it does men.[7] Many of the other contexts in which the Court has found that state laws violate individual liberty also present issues of particular importance to women.[8] This Court should not retreat from the principled approach to liberty recognized in *Griswold*, because the freedom and autonomy of women and other historically oppressed groups depend so heavily on the fundamental liberties that this Court has historically protected.

Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

[6] *See Cruzan*, 497 U.S. at 289 (O'Connor, J., concurring) ("the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water"); *Compassion in Dying v. Washington*, 79 F.3d 790, 803-806 (9th Cir. 1996) (*en banc*).

[7] Women are not the only group specially impacted by the liberty interest recognized in *Griswold*. Prior to *Griswold*, in Connecticut, educated married couples who had money obtained and used contraceptives, and the burden of the criminal prohibition fell on the uneducated and the poor. *See* David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of* Roe v. Wade 197 (1994).

[8] *See, e.g., Carey v. Population Services International*, 431 U.S. 678 (1977) (recognizing minor's right to purchase non-prescription contraceptives without parental consent); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (recognizing right of family members to live together); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (recognizing unmarried people's right to obtain contraceptives).

The Solicitor General seeks to trivialize Respondents' claims that the criminal bans challenged here violate fundamental rights to choice, autonomy, dignity, privacy and intimate association by narrowing the claimed interest to a desire to "avoiding severe pain or suffering".[9] For Respondents and the physicians who serve them, the power to choose the circumstances and timing of their death involves far more than simply avoiding pain or suffering. It involves an act of self-assertion and self-control over the only thing they can control. It involves the ability to end their lives in a dignified, painless manner in the presence of their physicians and loved ones. In short, Respondents' claim to choice implicates "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy". *Casey*, 505 U.S. at 851.

II. AN HISTORICALLY FROZEN CONCEPT OF LIBERTY IS CONTRARY TO THIS COURT'S PRECEDENTS AND POSES A SPECIAL THREAT TO WOMEN.

In recent years, an alternative approach to the definition of constitutionally protected liberty has been offered. That approach resolves claims to constitutional liberty by reference "to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified".[10] The States, and the lower court judges who

---

[9] Brief for the United States as *Amicus Curiae*, in No. 96-110 ("United States Br.") at 16.

[10] *Michael H. v. Gerald D.*, 491 U.S. 110, 128 n.6 (1989) (Scalia, J.) (citing in part *Bowers v. Hardwick*, 478 U.S. 186 (1986)) (denying a biological father the right to visit with his daughter, with whom he had an established relationship, because the mother subsequently married another man). Chief Justice Rehnquist joined this opinion. Justice O'Connor concurred "in all but footnote 6 of Justice Scalia's opinion". *Id.* at 132. Justice Kennedy joined Justice O'Connor's concurrence. Justice Stevens concurred in the judgment. Justices Brennan, Marshall, Blackmun

would deny Respondents' assertion of constitutionally protected liberty, rely primarily on this alternative jurisprudence, arguing that the Constitution protects only those liberty interests that were specifically protected in our Nation's history and tradition.[11] Such a wooden historical approach to constitutional jurisprudence is at odds with this Court's precedents and is particularly threatening to women.

This Court's precedents demonstrate an unwillingness to freeze the right to be free from arbitrary government interference within a static tradition or history. Notions of fundamental liberty and privacy have evolved continuously as our society has changed. Indeed, Justice Harlan stated over 30 years ago that the concept of liberty embodied in this Court's precedents has never "been reduced to any formula"

---

and White dissented.

[11] The States and many of the *amici* who support their position read this Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), as supporting an historically frozen concept of constitutionally protected liberty. *See, e.g.*, Brief for the Petitioner, in No. 96-110 ("Washington Br.") at 21-25 (arguing fundamental liberty must be "'deeply rooted in this nation's history and tradition'") (citing *Bowers*, 478 U.S. at 191-92); Brief *Amici Curiae* of The Legal Center for Defense of Life, Inc. and The Pro-Life Legal Defense Fund at 3-4. In rejecting Respondents' liberty claims, the Second Circuit considered itself bound by the States' reading of *Bowers*, and observed that "[its] position in the judicial hierarchy constrains [it] to be even more reluctant than the Court to undertake an expansive approach in this unchartered area". *Quill v. Vacco*, 80 F.3d 716, 725 (2d Cir. 1996). Similarly, the judges who dissented from the Ninth Circuit's *en banc* decision in favor of Respondents relied heavily on their perception of this Court's "unwillingness" to find new fundamental rights. *Compassion in Dying v. Washington*, 79 F.3d 790, 848 (9th Cir. 1996) (*en banc*) (Beezer, J., dissenting); *see also Compassion in Dying v. Washington*, 49 F.3d 586, 591 (9th Cir. 1995) (Noonan, J.) (refusing to "invent" a constitutional right that did not previously exist), *rev'd* 79 F.3d 790 (9th Cir. 1996) (*en banc*).

nor "determined by reference to any code".[12] The Court has continued to affirm that the constitutional protection of fundamental liberties cannot be limited by a static reading of history and tradition: "Neither the Bill of Rights nor the specific practices of the States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects". *Casey*, 505 U.S. at 848.

The formalistic definition of liberty urged by the States would have a particularly detrimental impact on women. It would freeze for all time the social inequalities suffered currently by women and eliminate all chances for judicial or constitutional facilitation of the achievement of gender equality. It would allow a state to enact legislation that reinforced "its own vision of the woman's role" anywhere that vision can be found to be rooted in "our history and our culture". *Casey*, 505 U.S. at 852. As Justice Ginsburg recently reminded us, "'our Nation has had a long and unfortunate history of sex discrimination'". *United States v. Virginia*, 116 S. Ct. 2264, 2274-75 (1996) (citation omitted). At the time of the adoption of the Fourteenth Amendment, married women were deemed not to exist in the eyes of the law: they were not allowed to hold property, to contract, or to vote. Moreover, until the latter half of this century, the law explicitly sought to "perpetuate the legal, social, and economic inferiority of women". *Id* at 2276. The Constitution's basic guarantee of "liberty" must be interpreted

---

[12] *Poe*, 367 U.S. at 542 (Harlan, J., dissenting); *see also Rochin v. California*, 342 U.S. 165, 169 (1952) (Frankfurter, J.) ("In dealing not with the machinery of government but with human rights, the absence of formal exactitude or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions").

to prevent and redress such historical inequities, not to *reinforce* them.[13]

This Court has refused to embrace an historical definition of liberty that traps us in a stagnant society and abandons marginalized groups and unconventional life choices to oppressive government regulation.[14] *Griswold* raised such issues. Although the general "public opinion . . . of a bygone day" condemned the use of contraceptives, *Poe*, 367 U.S. at 546-57 n.12 (Frankfurter, J.), this Court correctly held that the Constitution protects a married person's right to obtain contraceptives. Likewise, this Court recognized in *Casey* that "interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process clause in *Loving v. Virginia*, [388 U.S. 1 (1967)]". 505 U.S. at 848. Indeed, in *Casey*, this Court expressly refused to interpret the Constitution by reference to an historical tradition that placed women at the "center of home and family" because that tradition is "no longer consistent with our understanding of the family, the individual, or the Constitution". 505 U.S. at 897.[15]

---

[13] *See, e.g., Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding mother's marriage to an African-American does not justify changing custody to father; "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"); *Orr v. Orr*, 440 U.S. 268 (1971) (state may not require that husbands, but not wives, pay alimony).

[14] *See National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting) ("Great concepts like . . . 'liberty,' . . . were purposely left to gather meaning from experience [,] [f]or . . . only a stagnant society remains unchanged.") (citations omitted).

[15] As the Ninth Circuit held, "if historical evidence of accepted practices at the time the Fourteenth Amendment was enacted were dispositive, this Court would not only have decided *Loving* differently, but it would not have held that women have a right to an abortion". 79 F.3d at 806.

The Solicitor General implicitly recognizes that a concept of constitutionally protected liberty frozen in 1868 is inconsistent with well established principles, and that it threatens all people whose equality and liberty were historically and wrongfully denied under our Constitution and laws.[16] Nonetheless, the Solicitor General offers a frozen and artificial concept of liberty: the Solicitor General suggests that the Court should recognize the liberties that had been deemed by this Court to be protected by the Constitution up through 1992, with the Court's decision in *Casey*, but go no further. According to the Solicitor General, then, a bench mark date of 1868, when equal protection and liberty were blatantly and pervasively denied to women and others would be wrong, but adopting a random but pleasing (in that it stops short of recognizing the right to determine the time and manner of death) benchmark date of 1992 is appropriate. This formulation is as flawed and inflexible as the States' interpretation, and for the same reasons.

This Solicitor General's predecessor, Charles Fried, offered a similar argument in 1989, urging that the Court overrule *Roe*, but retain *Griswold*.[17] The Court has rejected that argument and reaffirmed that "'liberty' is not a series of isolated points . . . [Rather i]t is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which

---

[16] United States Br. at 16-18.

[17] Specifically, in oral argument in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), Solicitor General Fried argued: "The government is not asking the Court to unravel the fabric of privacy rights but rather just to pull this one thread". Frank Susman, the lawyer for the women, responded that in his experience "when someone pulls a thread, the sleeve falls off." *See* Supreme Court Proceedings, Argument Before the Court, 57 U.S.L.W. 3715 (May 2, 1989).

also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."[18] This Court should likewise reject the current Solicitor General's attempt to freeze the development of our concept of fundamental liberty in 1992.

Apparently appreciating the grave threat that the States' anemic concept of liberty poses to women, the Solicitor General suggests that concepts of gender equality will suffice to protect certain rights of particular concern to women (like abortion) that have historically been protected as an aspect of fundamental liberty under our Constitution.[19] Many scholars have advanced gender equality arguments in support of fundamental liberty interests in reproductive choice.[20] *Amici*

---

[18] *Casey*, 505 U.S. at 848-49 (quoting *Poe*, 367 U.S. at 543 (Harlan, J., dissenting)) (internal quotations omitted).

[19] The Solicitor General quotes a law review article critique of physician assisted suicide that states: "'Requiring women to bear unwanted children threatens to lock them into a traditional and subordinate role, embodies assumptions about their inability to make autonomous moral choices, and burdens women as a group with obligations that have no counterpart in the burdens that the State demands from men'". United States Br. at 17 (citing Seth F. Kreimer, *Does Pro-Choice Mean Pro-Kevorkian? An Essay On Roe, Casey, And The Right To Die*, 44 Am. U.L. Rev. 803, 849 (1995)).

[20] *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375 (1985); Kenneth Karst, *The Supreme Court, 1976 Term - Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 53-59 (1977); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955 (1984); Herma Hill Kay, *Models of Equality*, 1985 U. Ill. L. Rev. 39; Katharine A. MacKinnon, *Reflections on Sex Equality under Law*, 100 Yale L. J. 1281 (1991); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan L. Rev. 261 (1992); Laurence H. Tribe, *Abortion: The Clash of Absolutes* 105 (1992).

support a concept of gender equality that encompasses concern with protection of fundamental rights of reproductive choice and will applaud judicial development of constitutional principles that recognize that reproductive choice encompasses issues of both gender equality and fundamental liberty. As the Court recognized in *Casey*, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives". 505 U.S. at 856.[21] Nonetheless, women have learned that their ability to participate fully in society depends on this Court's recognition of a principled and cohesive concept of liberty that embraces a wide range of highly intimate and personal decisions.[22] This Court should not retreat from its precedents recognizing such fundamental liberties in favor of a frozen and wooden concept of liberty merely because certain rights that are important to women may continue to be protected as a matter of gender equality.

III. WOMEN'S EXPERIENCES DEMONSTRATE THAT LIBERTY AND EQUALITY ARE THREATENED BY OVERBROAD PROTECTIONIST LEGISLATION.

The central argument offered to support imposing criminal sanctions on doctors who assist terminally ill patients to exercise their constitutional rights in the face of death is that

---

[21] *See also id.* at 852 ("[a pregnant woman's] suffering is too intimate and personal for the State to insist, without more, upon its own vision of the women's role, however dominant that vision has been in the course of our history and our culture").

[22] As shown above, cases such as *Griswold*, *Eisenstadt*, and *Moore*, which are at the heart of this Court's historic commitment to the protection of a principled and cohesive concept of liberty, have been particularly important to women. Those cases recognize a liberty interest that is enjoyed by both men and women, but that, as a practical matter, is more important to women because of the inequities suffered by women. *See supra* at 7-8.

the ban is necessary to protect certain vulnerable people.[23] As the debate among the Justices in *Cruzan* underscores, the question of how best to protect authentic individual choice where the individual whose life is at stake cannot make his or her own decisions is a complex matter.[24] The present cases, however, do not present these complex issues. Respondents here are competent, terminally ill people who have made the choice to die with as much dignity as possible, with the assistance and comfort of their physicians. Respondents' decisions are clear. Although the States may act to protect informed and authentic choice, they cannot override the fundamental right of the terminally-ill to choose the circumstances of their death merely because they want to protect others who would make different choices. And the States cannot *prevent* the terminally-ill from choosing to

---

[23] Washington Br. at 33-38; Brief for the Petitioners, in 95-1858 ("New York Br.") at 27-32; United States Br. at 19-32.

[24] In *Cruzan*, this Court accepted the principle that a terminally ill patient has a constitutional right to discontinue life-sustaining treatment, including a forced feeding apparatus. The Court split over whether a state could demand that the guardians of a patient in a persistent vegetative state demonstrate the patient's wishes by "clear and convincing" evidence to terminate treatment. *See* 497 U.S. at 281 ("The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements."); *id.* at 316 (Brennan, J., dissenting) ("Missouri may constitutionally impose only those procedural requirements that serve to enhance the accuracy of a determination of Nancy Cruzan's wishes or are at least consistent with an accurate determination. The Missouri 'safeguard' that the Court upholds today does not meet that standard."); *cf. Casey*, 505 U.S. at 872 ("[t]hough the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed").

hasten their own deaths because the States disagree with and disapprove of their decisions to choose to die.[25]

The States argue, at bottom, that Respondents' fundamental liberty can be sacrificed as a necessary cost of protecting others: "individual cases cannot establish the foundation of a policy which would have such serious and widespread repercussions . . . . The interest of the individual cannot be separated from the interests of society as a whole".[26] The notion that "the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases,"[27] has been used historically to maintain the inequality of women under the law. In *Bradwell v. Illinois*, the Court invoked the presumed interests of society as a whole and the general social good to justify denying a qualified woman the right to practice law. *Id.* There the assumption was that Myra Bradwell was different from most women *and* that her own competence was irrelevant because allowing her to practice law would undermine general social expectations about the appropriate roles of men and women. Similarly here, the States argue that the interests of society as a whole justify denying Respondents' fundamental liberty because Respondents are presumed to be atypical.

Although a flat ban prohibiting doctors from helping competent, terminally ill people to exercise control over the circumstances of their deaths is unconstitutional, states are not

---

[25] *See Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990) ("[T]he regulation of constitutionally protected decisions . . . must be predicated on legitimate state concerns other than disagreement with the choice the individual has made . . . . Otherwise, the interest in liberty protected by the Due Process Clause would be a nullity.").

[26] New York Br. at 21; *see also* Washington Br. at 40.

[27] *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141-142 (1872) (Bradley, J., concurring).

powerless to regulate in this arena. Where abuse is likely, states may act to insure voluntary and informed choices that are free from coercion. By requiring doctors to treat their patients' pain and depression, and requiring that patients be provided with information about alternatives, states may safeguard against abuse without unnecessarily and impermissibly infringing on the liberty of those who choose to die. Indeed, prominent physicians, attorneys, and other professionals have offered model regulations that would achieve the States' legitimate goals of protecting against involuntary and accidental death far more effectively than the current absolute bans.[28] Oregon's Death with Dignity Act provides another model,[29] as do the standards developed by the Respondent physicians in this case.[30] Women have often suffered coercion and abuse at the hands of the medical profession in relation to pregnancy and birth control.[31] As such, women have a keen appreciation for the ways in which narrowly tailored regulation of physicians can provide protection against malfeasance and abuse. A prohibition on choice like the ones at issue here, however, will not achieve that objective.

---

[28] *See, e.g.*, F. G. Miller, et al., *Regulating Physician Assisted Death*, 331 N. Eng. J. Med. 119 (1994); Charles H. Baron, et al., *A Model State Act to Authorize and Regulate Physician-Assisted Suicide*, 33 Harv. J. on Legis. 1 (1996).

[29] 1995 Or. Rev. Stat. § 127.800 et seq.

[30] *See infra* note 36.

[31] *See, In Re A.C.*, 573 A.2d 1235 (D.C. Ct. of App. 1990) (holding that cesarian section provided against the wishes of a competent woman violated her common law rights); *Buck v. Bell*, 274 U.S. 200 (1927) (approving compulsory eugenic sterilization and implicitly overruled by *Skinner v. Oklahoma*, 316 U.S. 535 (1942)); *Relf v. Weinberger*, 372 F. Supp. 1196, 1199 (D.D. C. 1974) (discussing coerced consent to sterilization and government efforts to prevent it in the context of the Medicaid program), *vacated by* 565 F.2d 722 (D.C. Cir. 1977).

Women's experience under the Constitution and laws of the United States evidences the dangers inherent in such overbroad, "protectionist" policies. Consider the history of the regulation of abortion in this country. The 19th century laws criminalizing abortion were adopted at the urging of the medical profession, in significant part because of a desire to "protect" women from the dangers of abortions provided by unskilled practitioners.[32] Criminal bans against abortion, however, did not prevent people from seeking or performing abortions.[33] The ban served to make the procedure more costly, more humiliating, more dangerous and often deadly.[34]

---

[32] *Roe v. Wade*, 410 U.S. 113, 148-49 (1973) ("When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman . . . . Antiseptic techniques . . . were often not generally accepted and employed until about the turn of the century. Abortion mortality was high."); *see also* James Mohr, *Abortion in America: The Origins and Evolution of National Policy* 21-22, 31-32, 37 (1978).

[33] Regina Stix & Dorothy Wiehl, *Abortion and Public Health*, 28 Am J. Pub. Health 622, Table I (1938) (noting that the incidence of abortion ranged from one pregnancy in seven at the turn of the century to one in three in 1936). The Kinsey Report found that in the 1950s between one in five and one in four women who had ever been married had aborted a pregnancy. Almost 90 percent of the premarital pregnancies reported in that study were ended by abortions, most of them illegal. Paul Gebbard et al., *Pregnancy, Birth, and Abortion* 93-94, 54 (1958). In the 1950s, researchers estimated that between 200,000 and one million U.S. women had illegal abortions each year. *Abortion in the United States* 178-80 (Mary S. Calderone ed., 1958).

[34] Most illegal abortions were performed "under unsafe—usually degrading—conditions". Frederick S. Jaffe, Barbara L. Lindheim & Philip R. Lee, *Abortion Politics: Private Morality and Public Policy* 22 (1981). Illegal abortionists apprehended in the 1960s following the deaths of women "included a boat-yard worker, a real-estate salesman, a hospital orderly, and an automotive mechanic. These operators often worked under unsanitary conditions and avoided anesthesia, so they could speed women who had just been aborted on their way." *Id.* In 1961, the Center for Disease Control identified 320 deaths from complications of illegal

It also spawned a two-tiered abortion system in which the quality of medical care a woman seeking to abort received depended on her class, race and state of residence. Poor and rural women obtained illegal abortions performed by people, not necessarily doctors, willing to defy the law out of sympathy or for the fee. More privileged women crossed state lines or pressed private physicians for legal abortions.[35]

A blanket ban on physician assistance in dying does not support authentic individual choice, and, indeed, is likely to undermine it. Unregulated, renegade doctors, like back-alley abortionists, may utilize a flat ban on physician assisted suicide to obtain patients whose wishes to die may not be tempered by the careful procedural controls necessary to ensure informed consent. Indeed, it is a states's criminalization of this procedure that undermines the legitimate state interest in promoting authentic patient choice. For example, it has been reported that Dr. Kevorkian hastened death for one patient for whom Respondents in this case would not have sought death or help in dying.[36] As with

---

abortions. *Id.* In 1959, abortion deaths from illegal abortions accounted for one-third of all maternal deaths. Kristen Luker, *Abortion and the Politics of Motherhood* 74 (1984). In 1927 and 1928, a fifteen-state survey found that 794 women (or ten percent of all maternal deaths) had died from the complications of illegal abortions. *Id.* at 49.

[35] Luker, *supra* note 34, at 57. In addition, in the 1960s, clergy formed problem pregnancy consultation services "that referred women to competent, though illegal, practitioners. These consultation services were used primarily by women of means, not the poor." Jaffe, *supra* note 34, at 22.

[36] For example, Respondent Compassion in Dying

> "will not assist anyone to commit suicide who expresses any ambivalence or uncertainty. If the patient has immediate family members or other close personal friends, their approval must be obtained. . . . Compassion in Dying requires the patient to provide medical records. A consulting physician must review them to verify the patient's terminal prognosis and decision-making capability as well as to rule out inadequate pain management as the reasons for requesting assisted suicide."

Compassion in Dying v. Washington, 850 F. Supp. 1454, 1458 (D. Wash. 1994). Other Respondent physicians would adopt similar norms to assure that patients' requests for assistance in dying is voluntary, informed and uncoerced.

Dr. Kevorkian, a retired pathologist, does not appear to apply such safeguards to assure that patients are terminally ill or that their consent is authentic and informed. From a woman's point of view, the facts of *People ex rel. Oakland County Prosecuting Attorney v. Kevorkian*, 534 N.W.2d 172, 173 (Mich. Ct. App. 1995), *cert. denied sub nom. Kevorkian v. Michigan*, 117 S. Ct. 296 (1996), are especially disturbing. Janet Adkins was 54 years old. She was diagnosed as suffering from Alzheimer's disease. But, at the time Dr. Kevorkian "helped" her to die, she "was not terminally ill nor suffering from pain." *Id.* at 174. She had played tennis within days of her death. Yet, Dr. Kevorkian "made no real effort to discover whether Ms. Adkins wished to end her life, relying largely on the statements of her husband and a few limited responses from Mrs. Adkins." *Id.*

[37] Although prosecutors often sought indictments against illegal abortionists, juries rarely returned convictions. Luker, *supra* note 34, at 53. Convicted abortionists were often dealt with leniently:

> "A statistical analysis of all 111 convictions for abortion in New York County between 1925 and 1950 (about four convictions per year) indicates that 44 percent of those convicted were given probation. This is all the more remarkable when it is realized that . . . in 10 percent of the cases the woman had died as a result of the abortion."

Id. at 53-54. The experience of Dr. Kevorkian has been similar to that of the back-alley abortionist. Kevorkian has admitted to being present at 44 deaths since 1990. *See* Bill Varner, *Kevorkian vs. the Prosecutor: a Last Attempt at Conviction by Thompson*, USA Today, Nov. 1, 1996, at 3A. He has been charged with and tried for crimes stemming from his actions three times and each time he has been acquitted. *See Kevorkian Faces New*

abortion, when the criminal law prohibits ethical doctors from providing patients the help they need to exercise fundamental life choices, patients turn to alternative, often inferior practitioners. Similarly, as with abortion, juries often are unwilling to enforce a blanket ban that condemns all those who seek to help patients exercise fundamental liberties.[37]

As with abortion services before legalization, the blanket ban against doctor-assisted suicide has created a two-tier system where the wealthy and privileged continue to exercise a fundamental right that they would deny to those they consider vulnerable to coercion. John H. Pickering, Senior Counsel to Wilmer, Cutler & Pickering and Counsel of Record for the *Amicus* American Geriatrics Society supporting the States in these cases, defends criminal sanctions against doctors who help terminally ill patients exercise choice in the face of death on the ground that we need to protect the most vulnerable segments of our society—the elderly, the poor and persons with disabilities.[38] No one could challenge this as a valid public policy. Such protectionist policies, however, create real world conundrums and double standards, as revealed by Mr. Pickering's frank admission that, "[a]t the same time I selfishly reserve my right to do in private what my family, my doctor and pastor and I, in loving consultation, voluntarily agree is best."[39] Respondents simply argue that everyone should have this "right" to choose that Mr. Pickering assumes is his.

If the States' position were accepted, an individual's ability to make certain highly intimate and personal choices—whether those choices are about procreation, abortion, or death—could be denied through a blanket ban that guards against some hypothetical threat posed by the exercise of that liberty. Moreover, fundamental liberty could be denied by a state if this Court were to defer to a state's judgment that a flat criminal ban is the best way to protect those who are

---

Charges, Reuters, Ltd., Oct. 31, 1996.

[38] *See* Brief for *Amicus Curiae* American Geriatrics Society at 23-26.

[39] John H. Pickering, *The Continuing Debate Over Active Euthanasia*, 3 A.B.A. Bioethics Bull. 1, 15 (1994).

vulnerable to coercion. That cannot be the law.[40] A state does not advance its interest in prohibiting coercion by enacting a blanket ban that prevents free and voluntary decisions regarding highly personal and intimate matters, including decisions to hasten death in the face of terminal illness. Women's experience shows that such protectionist, blanket bans stifle authentic choice and force individuals to exercise their rights in unsafe and unregulated environments.

IV. THE STATES' CLAIM THAT CRIMINAL SANCTIONS MAY BE IMPOSED TO PROTECT LIFE OVER THE OBJECTION OF THE COMPETENT, TERMINALLY ILL PERSON WHO LIVES IT POSES A SPECIAL THREAT TO WOMEN.

The States claim that a blanket ban against doctor-assisted suicide advances a legitimate interest in preserving life.[41] Women have confronted similar arguments in the context of overbroad laws that infringe their fundamental right to exercise liberty over their own bodies and lives by choosing an abortion. In that context, this Court rejected the argument that the state has an uncompromising interest in protecting potential life that could justify the criminalization of all abortions.[42] This Court balanced the state's interest in

---

[40] *See Casey*, 505 U.S. at 869 ("[l]iberty must not be extinguished for want of a line that is clear"); *Cruzan*, 497 U.S. at 355 ("[T]his Court cannot defer to any state policy that drives a theoretical wedge between a person's life, on the one hand, and that person's liberty or happiness, on the other. The consequence of such a theory is to deny the personhood of those whose lives are defined by the State's interests rather than their own.") (Stevens, J., dissenting).

[41] New York Br. at 20-26; Washington Br. at 34.

[42] *See Casey*, 505 U.S. at 857 ("our cases since *Roe* accord with *Roe*'s view that a State's interest in this protection of life falls short of justifying any plenary override of individual liberty claims").

protecting potential life against the interest of women in obtaining an abortion, and expressly held that the former must yield to the latter until the potential life at issue (the fetus) is viable. *Roe*, 410 U.S. at 162-63; *Casey*, 505 U.S. at 870-71. Moreover, even after the point at which a fetus becomes viable, a woman's liberty interest in preserving her own life or health overrides the state's interest in protecting the potential life of the fetus. *Roe*, 410 U.S. at 164-65; *Casey*, 505 U.S. at 846.

The States' asserted interest in protecting life must be balanced against the right of the terminally-ill to choose the time and manner of their own death. That balance tips decidedly in favor of the liberty interest of terminally ill patients. The state does not have an interest in preserving the life of all citizens at all times and under all situations. This Court recognized in *Cruzan* that a person has a constitutionally protected liberty interest in refusing unwanted medical treatment, 497 U.S. at 278, which means that the state's interest in protecting life cannot override the right of a person to hasten death by discontinuing a life support system. *Id.* at 288 ("Such forced treatment may burden that individual's liberty interests as much as any state coercion") (O'Connor, J., concurring). As with individuals whose lives are sustained by permanent life support systems, the state has no interest in preventing a competent, terminally ill person who is suffering severe and untreatable pain from hastening his or her own death.[43]

---

[43] As Justice Stevens stated in *Cruzan*, "[h]owever commendable may be the state's interest in human life, it cannot pursue that interest by appropriating Nancy Cruzan's life as a symbol for its own purposes. Lives do not exist in abstraction from persons, and to pretend otherwise is not to honor but to desecrate the State's responsibility for protecting life". 497 U.S. at 356-57.

The States may have a legitimate interest in protecting life by preventing doctors, family members and others from coercing a terminally ill person to hasten his or her own death. Indeed, such an interest is fully consistent with the fundamental right of a terminally ill person to hasten death. By preventing coercion through the reasoned regulation of an individual's exercise of his or her liberty, a state can actually protect the fundamental right to hasten death by assuring that the right is exercised knowingly and voluntarily. *See supra* at 17-18. However, a law that criminalizes all doctor assisted suicide impermissibly infringes upon that right and relegates those who choose to exercise their right despite the state's prohibition to the realm of the uninformed, unsafe and unregulated.

V. THE CLAIM THAT THE CONSTITUTION PROHIBITS ONLY LAWS THAT ARE INVALID IN EVERY IMAGINABLE CIRCUMSTANCE IS INCONSISTENT WITH ESTABLISHED SUPREME COURT PRACTICE.

Before being reversed *en banc*, the three judge Ninth Circuit decision below held that the challenged statute must be upheld because "there were circumstances in which the statute could operate constitutionally, for example to deter suicide by teenagers or to prevent fraud upon the elderly".[44] The principle applied by the three judge panel was first articulated in *United States v. Salerno*, where the Court stated in dictum that a challenge to an overbroad law that denies constitutional liberty must be rejected unless "no set of circumstances exist under which the [law] would be valid". 481 U.S. 739, 745 (1987). That principle has no application in these cases and, in any event, is not the law.

---

[44] *Compassion in Dying*, 49 F.3d at 591.

The rule articulated in *Salerno* has no application to these cases because Respondents challenge the laws at issue here as applied only to them and similarly situated people and seek a remedy to protect the constitutional right that they assert. In its *en banc* decision, the Ninth Circuit explicitly held that the blanket prohibition on physician assisted suicide is unconstitutional only insofar as it is "applied to the prescription of life-ending medication for use by terminally ill, competent adult patients who wish to hasten their deaths".[45] The States do not challenge the Ninth Circuit's rejection of the *Salerno* rule or argue that these are appropriate cases for this Court to adopt the rule they urged below.

Further, the novel claim that courts may not recognize violations of fundamental constitutional liberty unless it is possible to say that the law challenged is unconstitutional in every conceivable circumstance is not, and has never been the law. For example, in *Griswold*, plaintiff physicians, on behalf of married patients, challenged a law that prohibited doctors from prescribing contraceptives for any patient.[46] If the peculiar new remedial notion urged by the States in the lower courts had been the law in 1965, the Court would have denied relief in *Griswold* because the blanket ban might have been

---

[45] *Compassion in Dying*, 79 F.3d at 798. Similarly, the Second Circuit held "that physicians who are willing to do so may prescribe drugs to be self-administered by mentally competent patients who seek to end their lives during the final stages of a terminal illness. *Quill*, 80 F.3d at 718.

[46] The Connecticut statute challenged in *Griswold* read: "Any person who uses any drug, medical article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned". 381 U.S. at 480. Upon finding the law unconstitutional, the Court ordered that the criminal convictions be reversed and the law be struck. *Id.* at 485-86, 499.

constitutional as applied to unmarried teenagers or to doctors prescribing contraceptives that were, for example, ineffective and dangerous. That was not the approach adopted in *Griswold*. Rather the Court considered the claim presented to it, held that the law was unconstitutionally overbroad and reversed the criminal convictions of the parties before it.[47]

The wiser and accepted course in cases challenging broad criminal statutes that violate constitutional liberty is simply to hold that the law is unconstitutional as applied to the parties before the Court and those who are similarly situated or to strike the law as unconstitutional on its face. This allows state legislatures to craft laws that protect legitimate state concerns, without overbroad infringement of constitutional liberty. It invites state and federal legislatures to "participate in a dialogue" and to act to develop more refined approaches that both respect fundamental individual choice and protect against coercion and abuse.[48]

This radical concept that a court may not protect a violation of constitutional liberty unless the challenged law is unconstitutional in every conceivable circumstance has been applied by some judges in cases challenging restrictive abortion laws that plainly violate the rights affirmed in *Casey*.[49] It would, if adopted, extend the substantive rule of

---

[47] The Connecticut Court of Errors set aside the defendants' convictions and remanded to the trial court for further proceedings consistent with the judgment of the Court. *Griswold v. Connecticut*, 213 A.2d 525 (1965). The Connecticut legislature repealed the challenged laws. 1969 Conn. Pub. Acts 282, § 214 (eff. Oct. 1, 1971).

[48] Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1198, 1204 (1992).

[49] *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011 (1993) (Rehnquist, C.J., White, J., and Scalia, J., dissenting from the denial of *certiorari*); *Barnes v. Moore*, 970 F.2d 12, 14 & n.2 (5th Cir.), *cert. denied*, 506 U.S. 1021 (1992).

deference to state discretion to regulate economic affairs to cases in which the Court has found that a law burdens a fundamental personal liberty without justification. It would use the remedial phase of constitutional adjudication to enshrine substantive constitutional principles wholly deferential to state power.[50] As Justice Stevens has noted, "*Salerno*'s rigid and unwise dictum has been properly ignored in subsequent cases".[51] Certainly it has no application to these cases in which Respondents challenge the application of absolute bans that deny them their fundamental rights of liberty and serve no legitimate state purpose.

As the Court recognized in *Cruzan*, "in deciding 'a question of such magnitude and importance . . . it is the [better] part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject.'" 497 U.S. at 277-78 (citing *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897)).

---

[50] Sylvia A. Law, *Physician-Assisted Death: An Essay on Constitutional Rights and Remedies*, 55 Maryland L. Rev. 292, 324-341 (1996).

[51] *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 116 S. Ct. 1582, 1583 (1996) (memorandum opinion concurring in denial of petition for *certiorari*).

CONCLUSION

For the foregoing reasons, the decisions of the Courts of Appeals should be affirmed.

December 10, 1996

Respectfully submitted,

CHRISTOPHER J. STESKAL
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Of Counsel

SYLVIA A. LAW*
40 Washington Square South
New York, NY 10012
(212) 998-6265

Counsel for Amici Curiae

* Counsel of Record